

LICENSE APPEAL COMMISSION  
CITY OF CHICAGO

Leona's Pizzeria, Inc. )  
Leon Toia, President )  
Licensee/Suspension )  
for the premises located at ) Case No. 09 LA 24  
646 North Franklin )  
)  
)  
v. )  
)  
Department of Business Affairs and Consumer Protection )  
Local Liquor Control Commission )  
Norma I. Reyes, Commissioner )  
)

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

The licensee received notice from the Local Liquor Control Commission that a hearing was to be held in connection with disciplinary proceedings regarding the City of Chicago Liquor License and all other City of Chicago licenses issued to the licensee for the premises located at 646 N. Franklin. The charges were that the license:

1. On or about May 6, 2008, sold, by and through its agent, advertised or promoted the prohibited practice under 235 ILCS 5/6-28 (b)(2) of selling, offering to sell, or serving to any person an unlimited number of drinks of alcoholic liquor during a set period of time for a fixed price, in violation of 235 ILCS 5/6-28 (b)(6).
2. That on or about May 6, 2008, the licensee, by and through its agent, sold, offered to sell, or served to a person an unlimited number of drinks of alcoholic liquor during a set period of time for a fixed price, in violation of 235 ILCS 5/6-28 (b)(2).

This matter proceeded to a hearing before Deputy Hearing Commissioner John F. Lyke,

Jr. on November 24 and December 15, 2008. He entered Findings of Fact that the City did meet its burden of proof on these two charges and based on the violation and violation history of the establishment, recommended a five day closing. Norma Reyes the Commissioner of the Department of Business Affairs and Consumer Protection/Local Liquor Control Commission adopted these findings and recommendation. The licensee filed a timely Notice of Appeal with this Commission. Oral argument was heard on June 10, 2009.

235 ILCS 5/6-28 addresses aspects of happy hours prohibited. Section (b)(2) says no retail licensee or agent of such licensee to sell, offer to sell or serve to any person an unlimited number of drinks of alcoholic liquor during any set period of time for a fixed price, except at private functions not open to the general public. Section 6 bars licensees from promoting this type of activity.

Since this case deals with review of a suspension the jurisdiction of this Commission is limited to the following issues:

- a. Whether the Local Liquor Control Commissioner has proceeded in the manner provided by law;
- b. Whether the order is supported by the findings;
- c. Whether the findings are supported by substantial evidence in light of the whole record.

In making these determinations this Commission is limited to the record of the proceedings before the Local Liquor Control Commission.

The City called one witness in its case in chief. Police Officer Pamela McGrath has been

a Chicago Police Officer for twenty years and is currently assigned to the Licensing Section. On May 8, 2006, she and her partner at approximately 6:30 p.m., went to 646 N. Franklin to investigate a complaint of a happy hour violation. The establishment there is a restaurant with liquor. As she entered she observed a banner on the wall advertising happy hour Monday through Friday from 4:00 to 7:00. She and her partner were approached by the bartender, Connie, who told them happy hour consisted of serving certain drinks for \$5.00 until 7:00. McGrath ordered a glass of white wine and her partner ordered a mai tai. The drinks were \$5.00 each. Connie added that the mai tai would be \$10.00 after 7:00. Officer McGrath identified City's Exhibit 9, in evidence, as a picture of a sign that was on the inside of the restaurant that states "Happy Hour 5:00 to 7:00, All appetizers \$5.00 at the bar." City's Exhibit 3, is a picture of a sign on the outside of the building that advertises:

River North Happy Hour Every Monday through Friday,  
4:00 p.m. to 7:00 p.m. , Serving 365 Days a Year until  
4:00 a.m.

On cross Officer McGrath stated she paid cash for the drinks and received a receipt. That receipt was given to her sergeant. McGrath left a tip of two or three dollars and the tip and the drinks were paid for with money requisitioned from the Chicago Police Department. The witness did not have a copy of the requisition request. Her case report indicates the witness arrived at 4:30 p.m. She later prepared a memo that said the sale occurred at 6:30 p.m. She was not waiting for two hours before the drinks were ordered.

The licensee presented evidence of the computer menu system in place at the location on

May 6, 2008. In essence this program prevented bartenders from changing the price of a drink. There was a screen and button for happy hour appetizers because there is a different price for appetizers during happy hour. Sales reports can be printed which reflect all of the sales at the location for a particular day. Those reports do not show the sale of red wine, white wine or margaritas. There was also testimony denying sales of reduced price drinks anytime and specifically on May 6, 2008.

While charges in Administrative Hearings do not require a high degree of specificity to satisfy due process, they must advise a respondent for the nature of the charges against them. In this particular case the City's charges stated the violation of the Happy Hour statute was the selling, offering to sell, or serving to a person an unlimited number of drinks of alcoholic liquor during a set period of time for a fixed price. This alleges a violation of a specific subsection of the Happy Hour statute. 235 ILCS 6-28(b)(2). It also specifically alleged a violation of 235 ILCS 6-28(b)(6) through the licensee's advertising or promoting the prohibited practice under Section (b)(2). When the City charges specific violations it must prove those specific charges.

The findings in this case by the Deputy Hearing Commissioner are not supported by substantial evidence in light of the whole record. This Commissioner is aware of the law threshold there is to find substantial evidence in the record of these appeals. The fact is that there is no evidence showing the licensee sold, offered to sell, or served any person an unlimited number of drinks of alcoholic liquor during a set period of time for a fixed price. There was no evidence the licensee promoted or advertised this prohibited practice. Taking the City's

evidence in a light most favorable to it, it might have proved a violation of another section of the “Happy Hour” statute but that was not charged and cannot be a basis to uphold the five day suspension.

The five day suspension is reversed.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for FIVE (5) days is hereby REVERSED.

Pursuant to section 54 of the Illinois Liquor Control Act, a petition for rehearing may be filed with this commission within TWENTY (20) days after service of this order. The date of the mailing of this order is deemed to be the date of service. If any party wishes to pursue an administrative review action in the Circuit Court the petition for rehearing must be filed with this commission within TWENTY (20) days after service of this order as such petition is a jurisdictional prerequisite to the administrative review.

Dated: July 31, 2009

Dennis M. Fleming  
Chairman

Stephen B. Schnorf  
Member